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Instructions on File  
B-88872

March 10, 1950

The Honorable  
The Secretary of the Army

L. R. Houston  
25X1A

My dear Mr. Secretary:

There has been considered your letter of August 29, 1949, with enclosures, requesting decision as to whether the Regular Army commission of Colonel John R. Noyes was vacated under the provisions of section 1222, Revised Statutes, 10 U.S.C. 576, "upon his appointment by the Secretary of the Interior to the office of Commissioner of Roads for Alaska." In an opinion dated August 1, 1949, the Judge Advocate General of the Army concluded that Colonel Noyes "may have" vacated his commission in the Army upon "assumption of the civil office" of Commissioner of Roads for Alaska and the exercise of the functions pertaining thereto.

Section 1222, Revised Statutes, 10 U.S.C. 576, provides as follows:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

Section 2 of the act of January 27, 1905, 33 Stat. 616, as amended (48 U.S.C. 321), established a board of road commissioners in the Territory of Alaska, to be composed of an engineer officer of the U.S. Army to be "detailed and appointed" by the Secretary of War, and two other officers of the Army. The statute further provided that said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads, pack trails, etc., if in their judgment such roads or trails are needed. The said board was authorized to prepare maps, plans, and specifications for every road or trail they may lay out, and to accept or reject bids for such work. However, the act of June 30, 1932, 47 Stat. 446, 48 U.S.C. 321a, provided that from and after the passage of that act the duties authorized and authority conferred by law upon the board of road commissioners of the Territory of Alaska, and upon the Secretary of War, by the act of January 27, 1905, as amended, "are hereby transferred to the Department of the Interior, and shall hereafter be administered by the Secretary of the Interior, or under his direction, by such officer, or officers, as may be designated by him." Pursuant to such statutory authority the Secretary of the Interior on October 4, 1948, defined the purpose, organization, and duties of the Alaska Road Commission, in part as follows (Federal Register, October 1948, Vol. 13, Part 10, page 5954):

"2. Purpose. The Alaska Road Commission is responsible for the location, planning, and construction of roads.

bridges, ferries, trails and other works in the Territory of Alaska, except areas within national forest reserves.

"3. General description. The Alaska Road Commission, headed by the Commissioner of Roads for Alaska, is composed of a headquarters staff located at Juneau, Alaska, and four district offices located at Anchorage, Fairbanks, Valdez, and Nome.

"4. Commissioner of Roads for Alaska. All functions of the Alaska Road Commission are administered by the Commissioner of Roads for Alaska. The Commissioner is responsible for the formulation of policies and programs and for the over-all direction of the work. He is responsible directly to the Secretary of the Interior, reporting through the Director of the Division of Territories and Island Possessions.

"5. Chief Engineer. The Commissioner of Roads for Alaska is assisted by the Chief Engineer, who is responsible under his general supervision for the conduct of operations and represents him in his absence.

"The Commissioner of Roads for Alaska may exercise the authority conferred upon the Secretary of the Interior by the act of June 30, 1932, with respect to the functions to be performed by the Alaska Road Commission. The Commissioner of Roads for Alaska, the Chief Engineer and the Equipment Engineer of the Alaska Road Commission, and the Director of the Division of Territories and Island Possessions, are authorized, on behalf of the Department of the Interior, to make necessary certifications that equipment, materials, supplies, and buildings, surplus to the needs of the Departments of the Army, Navy or Air Force, or any other agency of the United States Government having title thereto, are essential for the construction, improvement, and maintenance of the Alaska road system."

It will be noted that the act of June 30, 1932, supra, did not continue in existence the board of road commissioners established by the act of January 27, 1905. On the contrary, the 1932 act in effect abolished the said board of road commissioners and transferred the authority theretofore vested in such board to the Department of the Interior and the Secretary of the Interior was charged with the administration of the act, "under his direction, by such officer, or officers, as may be designated by him."

It appears from correspondence quoted in the opinion of the Judge Advocate General of the Army that in the latter part of 1948 a comprehensive road building program had been approved for Alaska which would require several years to complete, and that the Army was interested in such program because of its vital importance to the National Defense Program. In view of the Army's interest in such program and Colonel Noyes' familiarity with the road program as well as the Alaska Railroad program and their interrelationship to the National Defense Program, the Secretary of the Army agreed that Colonel Noyes should be loaned or assigned to the Department of the Interior for a period of several years, to head such program, such assignment apparently being regarded as consistent with the authority contained in

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the original act to detail an Army officer for such work. By letter dated July 19, 1948, the Acting Secretary of the Interior advised Colonel Noyes that on or about August 1, 1948, he would "assume the duties of Commissioner of Roads for Alaska in charge of the Alaska Road Commission" and, also, that---

"As Commissioner of Roads for Alaska, you will be responsible directly to the Secretary of the Interior. However, you will report through the Director of the Division of Territories. I will expect you to keep in close touch with the Director and to clear the administrative and important policy matters with him.\* \* \*"

It is further understood that Colonel Noyes has not executed an oath of office as such commissioner and that he continues to draw the pay and allowances of a colonel in the Army.

It is noted that the said opinion of the Judge Advocate General of the Army, concluding that Colonel Noyes "may have" vacated his Army commission upon assumption of the duties of Commissioner of Roads for Alaska, is based to some extent on a decision of a former Comptroller General dated March 11, 1922, 1 Comp. Gen. 499, which considered the question as to whether an Army officer who accepted an appointment as a member of the Alaskan Engineering Commission vacated his commission as an officer of the Army. The statute in that case (act of March 12, 1914, 38 Stat. 305) authorized the President of the United States "to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this Act," that is, to construct and operate railroads in Alaska. That case involved the issuance of a Presidential commission as a member of the Alaskan Engineering Commission and acceptance of such commission and execution of an oath of office, and it was concluded, without discussion, that the Army officer exercised the functions of the "office" of Commissioner of the Alaskan Engineering Commission, and pursuant to section 1222, Revised Statutes, vacated his commission as an officer of the Army. That decision is not necessarily controlling in the present case.

The restriction in section 1222, Revised Statutes, is upon officers of the Army on the active list holding any "civil office" and exercising the functions of a "civil office." The term "civil office"--as distinguished from "military office"--is synonymous with "public office" and is usually defined in much the same terms. 42 Am. Jur. Public Officers, sections 2 and 22. The question as to whether a particular position in the public service is a "public office" or merely a public employment is sometimes difficult to ascertain. As stated in Stapleton v. Frohmiller, 85 p. 2d 49, at page 51 (quoting from Winsor v. Hunt, 243 P. 407, 412):

"\* \* \* There is no entirely satisfactory definition of a 'public officer' as distinct from an 'employee,' though there are many illustrations, and all the authorities recognize that the difference exists. We quote a few of the cases which discuss it. [Quoting cases.]

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"We think that in 22 Ruling Case Law, 381, g 12, the chief elements of a 'public office' are well summed up. The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an 'office,' while one which lacks any of them is a mere 'employment.' \* \* \*

The Stapleton case, supra, considered a statute enacted by the legislature of Arizona commonly known as the Unemployment Compensation Law of 1936, which established a commission of three members to be appointed by the Governor; the commission was to establish and supervise the conduct of two other separate divisions, namely, the Arizona State Employment Service Division and the Unemployment Compensation Division, both created pursuant to the act, and the commission was authorized to appoint a director for each division. Subsequently, the commission, by resolution, created the position of "executive director" to the commission and designated such director as the supreme administrative officer of the commission to which all heretofore created or designated executives and personnel shall be subordinate. The question for decision was whether the position of executive director is an "office" or merely an "employment." After citing the main elements of a "public office" the court stated (page 52):

"The position was obviously created by a resolution of the commission and not by any legislative body, for while it might be said that the act, by implication, provides for the creation of a position to be known as 'director of the unemployment compensation division', and another which should be called 'director of the state employment service', neither of these positions was the one to which petitioner was appointed. He was named to fill an entirely different one, to-wit, that of 'executive director' of all the activities of the commission. His duties were prescribed solely by a resolution of the commission, and were subject to change by it at any time. If the commission decided that the sole duty of the executive director was to mow the lawn in front of its office for a compensation of one dollar per year, it had the authority to so declare, and his only remedy, if he objected, would be to resign. It is true that the resolution gave him, so far as it was able to do so, complete power in the administration of the act, and this would necessarily involve the exercise of many of the sovereign powers of the state, but this permission was strictly limited in that his duties could only be performed under the supervision and with the consent and advice of the commission. We think such powers were more similar to those of a mere agent whose authority may be revoked at any moment, and whose acts are those of his principal rather than the independent exercise of the sovereign prerogatives of the state by a public officer.

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"After considering the matter fully, we are of the opinion that an 'office' is a position of 'employment,' may be created only by

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the legislative branch of the government, either directly or by necessary implication, for such branch alone has the authority to make 'law', and that any position which is established by the administrative department cannot be considered as an office within the meaning of the constitution, but rather as a mere employment.\* \* \*

Also, in State v. Spaulding, 72 N.W. 288 (cited in Stapleton v. Frohmiller, supra), the question arose as to whether a person appointed by the Commissioners of Pharmacy, as treasurer of that Commission, was a public officer, and the court stated that (page 290):

"\* \* \* It is to be observed that no such office as treasurer of the commission was created by either the constitution or by act of the legislature. Nowhere in the original act creating the commission of pharmacy, or in the amendments thereto, is any such office created; nor is there any authority conferred upon said commission to create or establish such an office, or any office whatsoever. In the act creating the commission it is provided, 'Said commissioners shall have power to make by-laws and all necessary regulations for the proper fulfillment of their duties under this act without expense to the state.' Now, the power thus conferred did not involve the right to create a public office or to appoint persons to places, who should be deemed public officers. Conceding that the legislature had the power to create the office of treasurer of this commission, it has at no time undertaken so to do. In the absence of legislative authority, the board could not create a public office.\* \* \*

"It is said that, even though there was no authority originally in the commission to create the office of treasurer, still the above provision was a recognition of the fact that there was such an office. We cannot so consider it. Here we have a position created without authority of the legislature, which alone could authorize its creation. The lawmaking power never prescribed any duties, nor authorized any one else to prescribe them, for such an officer. No part of the sovereign functions of government was ever delegated by the legislature to the individual who might fill such place, and none of the usual requisites of an office were provided for by the legislature. But the controlling facts are that this treasurer was a creation of the commission, without authority of law, and presumably for their own convenience, and at all time subject absolutely to their control. They not only created the office, but they fixed its tenure, and the compensation to be paid the occupant. They might allow him to act, as they did, without taking any oath of office; and, being a creation of their own, they could require him to give bonds, or not, as they pleased. Having created the place and appointed the incumbent, they could at any time dispense with his services, and abolish the so-called office. Such a one is not a public officer. \* \* \*

In Cain v. United States (1947), 73 F. Supp. 1019, the question arose as to whether a secretary to a judge of the Circuit Court of Appeals for the Seventh Circuit was "an officer of the United States" within the meaning of the Tucker Act, on the basis that the various appropriation acts for the Judiciary granted to such judges the power

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to appoint secretaries and that such appointments fall within the Constitutional provision (Article 2, section 2, clause 2) which grants to Congress the power to vest the appointment of inferior officers in the courts of law. In concluding that such a person was not an officer of the United States, the court stated (page 1020):

"In *Scully v. United States, C.C.*, 193 F. 185, 187, the court said: 'There can be no offices of the United States, strictly speaking, except those which are created by the Constitution itself, or by an act of Congress \* \* \*'.

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"Plaintiff, however, was not appointed pursuant to any express statutory authority therefor. In the absence of such statutory authority plaintiff was not an 'officer of the United States' because the constitutional provision here under consideration provides that 'Congress may, by law vest the appointment of such inferior officers \* \* \* in the courts of law.' In the cases where judges have considered this phrase 'by Law' it has been held to mean by specific legislation. Therefore, before an 'officer' may be appointed, Congress must have, by specific legislation created such 'office.' In *Burnap v. United States*, 252 U.S. 512, 40 S.Ct. 374, 376, 64 L.Ed. 692, the court held that a landscape architect in the office of Public Buildings and Grounds was an employee and not an officer of the United States the court saying: 'There is no statute which creates an office of landscape architect in the office of public buildings and grounds nor any which defines the duties of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910 36 Stat. 4687 \* \* \*'.

"In the instant case the only authority for the appointment of secretaries to circuit and district judges is found in the annual appropriation acts passed by Congress, but these appropriation acts nowhere create the office of secretary to which this plaintiff might have been appointed and thus have become an 'officer of the United States.' In *Martin v. United States*, 8 Cir., 168 F. 198, 203, the court did not accept the argument that the authorization of defendant's employment by the Government through an appropriation act constituted the specific statutory authority required by the Constitution. The court said: '\* \* \* The clerkship of this defendant was never established by any law. The authority under which his service was secured was not to appoint an officer to an office established by act of Congress or by regulation of the Department, but "to employ all assistance necessary for the prompt and efficient performance" of the duties of the commissioners \* \* \* and, when the Secretary of the Interior approved the defendant's employment, \* \* \* he labored under no misapprehension, and did not undertake to create an office for the defendant or to approve his appointment to one.'"

In decision of November 2, 1945, 25 Comp. Gen. 377, it was concluded that an Army officer who, while on terminal leave, accepts temporary employment with a State under the State Highway Commission



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to assume the management and direction of constructing a particular project under the general supervision of the Commission does not hold a "civil office" within the meaning of section 1222, Revised Statutes. As stated in that decision the term "civil office" in section 1222, Revised Statutes, was used as denoting a public position or employment having at least some of the generally recognized attributes of an "office" as differentiated from mere employment.

In the present case the position of Commissioner of Roads for Alaska was created by an administrative order of the Secretary of the Interior, and not by the legislative branch of the Government, either directly or by necessary implication. The Commissioner is responsible directly to the Secretary of the Interior and is expected to "clear the administrative and important policy matters" with the Director of the Division of Territories. Consequently, there appears to be none of the usual attributes of an "office" involved, unless, as stated in 25 Comp. Gen. 377, 385, the public importance of the position may be viewed as raising such employment to the dignity of an office. However, as stated in that decision, the relative importance of the duties to be performed, standing alone, could not have been intended by the Congress to mark the line between mere employment and "civil office" in applying the grave penalty of section 1222, Revised Statutes. In that connection, see Martin v. Smith, 1 N.W. 2d 163, 140 A.L.R. 1063, 1076, wherein it was concluded that the President of the University of Wisconsin, whose activities and duties were restricted by the Board of Regents, did not hold a public office, the court stating in part:

"It may seem anomalous to some that the President of a great university should not be a public officer while a justice of the peace or a notary public is a public officer. However, the character of the employment is not determined by the salary paid to the employee or by the importance of the duties which he performs or by the manner in which he is chosen, but rather by the nature of the duties he performs. In the case of the President of the University, the nature of these duties much more nearly conforms to the nature of the duties of a superintendent of schools than it does to the nature of the duties performed by a public officer. He is an employee, not a public officer; he holds a position not an office of trust, profit or honor under the state.\* \* \*"

Accordingly, since it does not appear that the present position of Commissioner of Roads for Alaska, administratively established by the Secretary of the Interior, is a "civil office" within the meaning of section 1222, Revised Statutes, and as the statutes relating to dual compensation or other statutes restricting pay do not appear to be involved (it being understood that Colonel Noyes is receiving his Army pay and allowances, only), you are advised that this Office is not required to object to payments of the officer's active duty pay and allowances while so assigned under the conditions stated herein.

Sincerely yours,

(Signed) FRANK L. YATES